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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

UNION AND PLANTERS' BANK

vs.

67.

CITY OF MEMPHIS, ET AL.

ASSIGNMENT OF ERRORS AND ARGUMENT FOR APPELLANT.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

UNION & PLANTERS' BANK, APPELLANT,

VS.

CITY OF MEMPHIS, ET AL., APPELLEES.

APPEALED FROM THE CIRCUIT COURT OF APPEALS. SIXTH CIRCUIT.

STATEMENT OF THE CASE.

The learned Judge who delivered the opinion of the Court, in the Circuit Court of Appeals, made such a clear statement of this case that we quote it. He said:

"The case is this: In 1859 the State of Tennessee, by its General Assembly, granted a charter under which the Union & Planters Bank was organized. That charter contained a provision upon the subject of taxation in these words: 'That said company shall pay to the State of Tennessee an annual tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes.' The complainant's bill avers that, in impairment of the obligation of the contractural exemption from every tax except that provided by the charter, the State of Tennessee has passed a law providing, among other things, for the assessment of State, county and city taxes upon the capital stock of this and all other corporations having like contractual exemptions, and that the city of Memphis, under and in pursuance of the legislation referred to, has assessed an ad valorem tax for the year 1899 upon the capital stock of the complainant bank for municipal purposes exceeding $2,000, and is about to distrain, etc. It is averred that the law under which this assessment has been made impairs the obligation of the contract by which the complainant is exempt from all taxa-

tion upon its capital stock other than that provided for in its charter. It is then averred that in a former litigation between this complainant and the city of Memphis, where it was sought to enforce a municipal assessment of taxes upon complainant's capital stock for the years 1888, 1889 and 1890, it was solemnly adjudged and decided that under the charter provision aforesaid the capital stock of said corporation was exempt from all general taxation. The record in the said suit and the judgment therein rendered—being a judgment of the Supreme Court of Tennessee—is set out in full, and pleaded and relied upon as an adjudication estopping the said city of Memphis from bringing the validity of the true and proper construction and meaning of said provision again into controversy. The bill is most specific in averring that the judgment so pleaded and set out as establishing the exemption of its said capital stock from taxation was based upon the identical claim of exemption now asserted by it in order to defeat the taxes now in question, and that 'the judgment and decree aforesaid adjudged its claim to exemption upon the identical same facts and conditions' as those appearing herein. Upon this former judgment between the same parties, and upon the same facts and issues, the complainant bank avers and contends that the question of the right of the city of Memphis to assess its capital stock 'has been finally judicially determined not to exist, because of the judicial construction put upon its exemption in the suit to determine that question between it and the said city of Memphis.' The defendant filed a demurrer assigning no less than twelve reasons why the complainant's bill should not be sustained. This demurrer was sustained, and the bill dismissed."

Upon the question of the jurisdiction of the Court and the equitable jurisdiction of the Court, the Circuit Court of Appeals held the assignments of demurrer not well taken, upon the merits—

First—That the capital stock of the complainant company was not contractually exempt from taxation; and,

Second—That the judgment pleaded as a bar to the assessment and collection of municipal taxes upon the capital stock of the appellant by the city of Memphis, was not res adjudicata by the decisions of the Supreme Court of Tennessee, because the tax complained of was assessed for a different year and the effect of a judgment in a tax case in Tennessee, when plead as an estoppel, is to limit it as res adjudicata of the par-

ticular tax actually in litigation in the prior suit, and not to extend it to subsequent taxes.

ASSIGNMENTS OF ERROR.

The appellant assigns as error:

I.

That the decision of the Circuit Court of Appeals is erroneous, in that it held that the provision in the charter of the bank, requiring the bank to pay to the State of Tennessee an annual tax of one-half of 1 per cent. on each share of stock subscribed, which shall be in lieu of all other taxes, does not exempt the bank from ad valorem taxes on its capital stock, but applies only to stock in the hands of the shareholders.

II.

In that it held the principle of res adjudicata was to be limited, and limited it in its application in this suit, to the taxes that were actually in litigation in the prior suit, and thereby denied appellant to the benefit of a former judgment construing its contractnal exemption.

1. Considering these assignments of error in the order stated, it is to be noted that this class of cases in the Supreme Court of Tennessee, and in this Court, evidences that from the first to the last one, the dicta of the Judge delivering the opinion of the Court, has been misconceived by the Judge delivering a subsequent opinion, until it is a subject of regret, expressed in several of the opinions, that the dicta have occurred at all in the course of the delivery of an opinion.

The learned Circuit Judge who delivered the opinion herein, in conclusion, said:

> "The opinion of the Supreme Court of the United States in the two cases of the Bank of Commerce vs. Tennessee, 161 U. S., 124, and Shelby County vs. the Union & Planters' Bank (161 U. S., 149), are binding authorities upon us, and require that we shall hold that the capital stock of the appellant bank is not exempt from ad valorem taxation by reason of the charter exemption claimed by the Union & Plnaters' Bank."

If it were not for the fact, that the Judges of the Supreme Court of Tennessee have persistently affirmed, from the first to the last reported case, prior to the above decisions of the Su-

preme Court of the United States, that the charter exemption protected the capital stock from ad valorem taxes, and this court has never had that precise question before it, we would hesitate to ask the Court to review the two decisions that have controlled the Supreme Court of Tennessee and the Circuit Court of Apppeals for the Sixth Circuit.

In the course of the opinion which he delivered in the case where the judgment was entered, now relied on as res adjudicata, Judge Caldwell, speaking for the Supreme Court of Tennessee, said:

> "Since the decision in the Farrington case by the Supreme Court of the United States, this court has uniformly adhered to its previous holding, that no ad valorem tax can lawfully be laid on the capital stock, and, in recognition of that decision, has gone further, and said that shares of stock are likewise exempt from other taxation than that prescribed in the charter." Bank vs. McGowan, 6 Lea, 705; State vs. Butler, 13 Lea, 406; Id., 86 Tenn., 633; 8 S. W., 586.

Continuing, the learned Judge said:

> "Considering the decisions of the Supreme Court of the United States in Farrington vs. Tennessee, 95 U. S., 679, 24 L. Ed., 558, and in Bank of Commerce vs. Tennessee, 104 U. S., 493, 26 L. Ed., 810, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of 1 per cent. is in lieu of all other taxes, whether against the bank on its capital stock or against owners on shares of stock. Under the construction there given, the charter exemption includes both. As an original question, we would hold as held by this Court in City of Memphis vs. Farrington, 8 Baxt., 539, and charge the stockholders with an ad valorem tax; but, upon authority, we hold as stated above. This Court has never decided, and in the absence of the ruling of the Supreme Court of the United States in Farrington vs. Tennessee, 95 U. S., 679, 24 L. Ed., 558, would not now decide, that the charter gives the owners of shares of stock any immunity or exemption from taxation on the shares. That question is now adjudged along upon the authority of that case. It did not arise and was not adjudged in Bank vs. McGowan, 6 Lea, 705, in State vs. Butler, 13 Lea, 406, or in Id., 86 Tenn., 633, 8 S. W., 586. Complainant seeks in addition to what has already been stated, to recover from the bank $1,800 as privilege taxes for the years 1889, 1890 and 1891. These taxes are claimed from the corporation for the right of exercising its franchises,

for the privilege of doing a banking business. Manifestly the charter tax was intended to cover this right or privilege. The language of the charter tax implies that in consideration of the public good and the payment of the tax therein specified, the State will allow the corporation to exercise the franchises granted without further taxation. City of Memphis vs. Hernando Ins. Co., 6 Baxt., 527; Union Bank of Tennessee vs. State, 9 Yerg., 490. The case of New Orleans C. & L. R. Co. vs. City of New Orleans, 143 U. S., 192, 12 Sup. Ct., 406, 36 L. Ed., 121, is not, as we understand it, an authority against this ruling. There the contract afforded no evidence of an intention to exempt the corporation from license or privilege tax. 143 U. S., 195, 12 Sup. Ct., 406, 36 L. Ed., 122. Here the intention to do so is clear and unmistakable. The charter tax was imposed primarily as a consideration for the corporate franchises and the right to exercise them. No other reasonable construction can be placed upon the words of the charter. The State is bound by its contract; and so, likewise, is the city of Memphis, which is but an arm or agency of the State government. This is true not only as to privilege taxes, but also with respect to the other taxes claimed in this case. All subjects of taxation covered by the charter tax are exempt from further assessment, whether made in behalf of the State, county or municipality. As to those subjects, the specified tax is in lieu of all the other taxes—State, county and municipal. Such is the undoubted meaning of the contract. City of Memphis vs. Hernando Ins. Co., 6 Baxt., 527; Union Bank of Tennessee vs. State, 9 Yerg., 490; City of Nashville vs. Thomas, 5 Cold., 600."

After this decision the case of Shelby County vs. the Union and Planters' Bank, supra, was handed down in the Supreme Court of the United States. In that case the charter exemption of the appellant was construed not to include the capital or surplus and undivided profits, and as limited to other taxes on shares of stock only.

In the last cited case, this Court, speaking by Mr. Justice Peckham, said, that the clause in the charter did not apply, or cover the case of the capital stock of the appellant, or its surplus and accumulated profits, and upon the latter subject so adjudged, after a consideration of the cases relied on. It would be inexcusable to ask this Court to again consider the construction of the exemption of appellant if it were not for the fact that for a period of a quarter of a century, there has been an opinion radically different on that subject as to the true con-

struction of the clause under consideration. The learned Justice, in the course of his opinion in Union, etc., Bank vs. Memphis, said:

"We do not admit the claim made by the counsel for the appellee that the Farrington case must have decided the exemption of the stock of the corporation, because in the case of Wicks against the State of Tennessee, mentioned in a note to the Farrington case, at page 690, as is claimed, the exemption was of the capital stock of the corporation, which was held, nevertheless, to come within the principle of the main case decided. There was no material difference in the meaning of the exemption clause in the various cases mentioned in the note to the Farrington case."

In the former argument, as in this, the contention was, and is that the charter tax was a special and discriminating rate of taxation, measured by, in the one instance, the shares of stock subscribed, in another, by the shares of stock paid in, and in a third, upon the amount of the capital stock actually paid in. It was from thtis last premise that the conclusion followed that the exemption was broader in its scope than the subject selected upon which to fix the special and discriminating rate of taxation in each charter.

If the premise is a correct one, this Court undoubtedly so held, in the case of Hill against the State, construing the charter exemption, for the discriminating tax was laid upon the amount of the capital stock actually paid in, and it exempted from taxation the shares owned by Mr. Hill. The exemption was expressed in these words: "Which shall be in lieu of all other taxes and assessments." The clause in the charter is as follows: "Be it further enacted, there shall be levied a State tax of one-half of 1 per cent. upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, and which shall be in lieu of all other taxes and assessments."

That there is a clear distinction between shares of stock and capital stock needs only suggestion. As stated by this Court, in the case of Shelby County against the Union Bank, etc., "this is no new doctrine, and the distinction between the two properties was considered by the Supreme Court of Tennessee as long ago as in the case of the Union Bank against the State.—9 Yerger, 490, decided in 1836.

For sixty years that has been a thoroughly understood question in Tennessee. Therefore, when the question of the scope of the exemption is to be considered, to ascertain its intent and purpose, we may not only look to its language, but to the history and circumstances preceding and surrounding the grant of this charter, and kindred ones.

It was perfectly understood, since Judge Turley's opinion in the Union Bank against the State, that a special and discriminating tax, by which a corporation was to pay annually one-half of one per cent. on the amount of capital stock paid in by the stockholders, other than the State, was a contract, and that any law or constitutional amendment, imposing an additional tax upon the capital stock, would impair its obligation, and also that it did not exempt from taxation any property of the Bank not necessarily included in its capital stock, or essential to the exercise of the privileges granted. This decision was without shadow of turning until this court handed down the opinion in the Bank Cases reported in 161 U. S.

In the light of the Union Bank against the State, these charters were passed, and the various provisions contained in the several exemption clauses, were surplusage, unless the meaning was broad enough to apply to and cover taxes, other and different taxes than upon the subject matter upon which was laid a special and discriminating tax annually to be paid.

The Supreme Court of Tennessee, with the question before it for judgment and decision, held that the charter tax in Memphis against the Memphis City Bank, 7 Pickle, 574-575, decided in 1892, was laid upon the capital stock, and it therefore affirmed that the shares of stock were subject to taxation.

In Memphis City Bank vs. Tennessee, 161 U. S., 196, Mr. Justice Peckham said: "We do not think that the plea of res adjudicata can be upheld upon the facts as stated. The former judgment was entered in an action commenced long prior to the Act of 1887, to cover taxes, alleged to have become due while the corporation, plaintiff in error, was engaged in its original business of an Insurance Company, and the judgment was upon the right of its shareholders to be exempt from any further taxation than that provided for in the charter, while the Company was doing business as such Insurance Company."

It is to be observed that the 7th section of the charter under

consideration, provided "that there shall be levied a State tax of one-half of one per cent. upon the amount of capital stock actually paid in, to be collected in the same way and at the same time as other taxes are by law collected, which shall be in lieu of all other taxes and assessments."

In Shelby County vs. Union, etc., Bank, on page 154, this Court also said: "Those clauses were of substantially the same "import as that in the Farrington case, and they are set forth "in the dissenting opinion of Mr. Justice Strong at page 692 "of the report. The whole Court was of one opinion upon the "subject that there was no substantial difference in the extent "of the exemption contained in the several charters, although "there was some difference in their phraseology, but the ques- "tion was, as stated by Mr. Justice Strong, which of the par- "ties was to receive the benefit of the exemption, viz: was it "to be the corporation, or was it intended for the individual "stockholders?"

In the discussion of the cases, the Supreme Court of Tennessee and counsel representing the Banks have been doubtless misled by the expressions in the opinion of Mr. Justice Swayne, which clearly indicate at least that his belief, not only were the shares in the hands of the stockolders exempt from any further taxation than that imposed by the charter, but that the property of the corporation was itself exempt from any taxation other than provided for by the charter itself.

This Court, in Shelby County vs. Union, etc., Bank, supra, adjudged that the charter tax was laid upon the shares of stock in the hands of the shareholders, and the exemption from further taxation applies to the subject which was taxed under the charter, and is not of any greater scope.

It is to be noted that the charter tax is not laid upon the shares of stock, but upon the shares of stock subscribed, while in the case of the Bank of Commerce vs. Tennessee, the charter tax is laid on each share of capital stock, and in the Memphis City Bank, on the amount of capital stock actually paid in.

With the greatest respect for the utterances of this Court, we submit that there is in the charters of the three banks a substantial difference, and such a substantial difference as to show that the legislative intent was not to lay a charter tax on the same subject of taxation, but to annex a royalty or

bonus annually to be paid the State, making in the instances of the three banks, a different selection by which to measure that bonus, viz: stock subscribed, shares of stock, and capital stock paid in.

The Legislature recognized the separate and distinct character of the two properties, the capital stock and the shares thereof in the hands of the individual shareholders, and upon that subject, this Court said: "And separate property, in our opinion, is strong proof of the limitation of the exemption to the property which is taxed." See page 159.

The policy of Tennessee has never been to tax the two subjects in banks. The act of the General Assembly of 1887 followed by the Act of 1889, and by periodical revenue laws, is exceptional, in that it was specifically directed to taxing three or four corporations existing under special charters.

But if the charter tax is laid on capital stock paid in in the charter of the Memphis City Bank, surely it is not laid on the shares of stock in the hands of the shareholders. It naturally follows that as capital stock is separate property from shares of stock, and the imposition of the charter tax is upon that particular separate property, this Court in Hill vs. Tennessee when it held that Mr. Hill's shares of stock in his hands were not subject to taxation, adjudged that the limits of the exemption was not confined to the property upon which a charter tax is laid, but extends to the shares of stock of the shareholders.

The cases reported in 7 Pickle and referred to by the Court and in which judgments were rendered affirming that the exemption covered capital stock and shares of stock also, are briefly, as follows:

On the 22d of October, 1891, the State of Tennessee, for the use of the city of Memphis, filed an original bill against the Hernando Insurance Company and John S. Dunscomb, and on the 30th of Ocober, 1891, the same plaintiffs filed an original bill against the Bluff City Insurance Co. and Wm. H. Moore, and on the 22d of October ,of the same year, the same plaintiffs filed an original bill against the Union and Planters' Bank and S. P. Read. In each of these proceedings the complainants averred that by the Revenue Law of the State of Tennessee, being the 14th Section of Chapter 2 of the Acts of 1887, the capital stock of each of these three corporations was subject to

taxation, if the shareholders therein were not taxable upon their shares of stock, and in each of these proceedings the complainants in them sought to have a final and conclusive determination of the question. These three suits were brought in the Chancery Court of Shelby County. To the end that the scope of the exemption might be settled in the first two suits referred to, it was stated: "Complainant is advised that in order to put at rest all questions arising under said charter, the corporation and the shareholders should be made parties to the same suit and proceeding, and the question of the extent of the exemption determined in such suit."

In the last of the cases above referred to the question is raised as follows:

"Wherefore, complainant desires that both the corporation and the shareholders may be brought before the Court in one proceeding and that it may then be determined whether the tax is validly levied on the shares of stock in the hands of the shareholders or on the capital stock in the hands of the corporation."

In each one of these three cases, the corporations their secretaries and cashier, claimed that the charter tax was an immunity from the payment of ad valorem taxes, either on account of capital stock or shares of stock, and that this exemption was a contract between each of the corporations and the State of Tennessee, and the laws set out in the bills of complaint impaired the obligation of the contract between the State of Tennessee and each of the defendants.

The opinion distinctly adjudged that the charter provision "that said company shall pay to the State an annual tax of one-half of 1 per cent. on each share of stock subscribed, which shall be in lieu of all other taxes," was a contractual exemption of both the capital stock of the corporation and the shares of stock in the hands of the stockholders, whether ad valorem or privilege, imposed by State, county or municipality.

These decisions were made fifty-six years after Judge Turley rendered the opinion in the case of Union Bank vs. State, reported in 9 Yerger. There would have been no doubt but that the questions would have been put at rest, arising under the several charters, but for what Judge Caldwell said in regard to the decision in Farrington vs. Tennessee. If he had decided the propositions that were raised, and adjudged (as was done),

that neither the shareholders nor the corporation, were liable to taxes on shares of stock, capital stock, or franchises, and left out of his opinion the dicta contained therein, there would have been but little difficulty in determining the scope of the exemption in this case.

On the question of the exemption of the shares of stock from taxation, the Supreme Court of Tennessee adjudged that the shareholders were exempt upon the authority of the Farrington case. Upon the other subjects of taxation, that Court adjudged the bank was exempt because of the plain and manifest construction of the language contained in each of the charters under review.

Between the decision in the Farrington case and the decision of the cases reported in 7 Pickle, there was no question that could arise which involved the liability of the shareholders in these several corporations which have exemption from all other than charter taxes because there was no attempt to tax such shares of stock until the suits were instituted in the Chancery Court of Shelby County, Tennessee, in October, 1891. The question that did arise, and the one which was adjudged in Bank vs. McGowan, 6 Lea, 703, was the scope of the charter of the Bank of Commerce, which provided that it shall pay to the State an annual tax of one-half of 1 per cent. on each share of capital stock, which shall be in lieu of all other taxes, the contention being that the exemption in its scope did not apply to the capital stock, or anything the capital stock was invested in, and on the other hand, that it did apply so as to protect the capital stock, its banking house purchased with a part of the capital stock, in its entirety, and three lots that had been purchased by the bank under foreclosure proceedings to save debts due it.

The Supreme Court of Tennessee affirmed that the scope of the exemption included, to the extent of its assessed value, so much of the banking house as was used as a place of business for the bank, but that it did not apply to the residue of that lot and building, and neither did it apply to the lots bought in satisfaction of debts. This judgment was appealed to this Court to the extent of the latter part, and here the bank claimed exemption of the entire property under its charter. So the question here was, is that claim well or ill-founded.

The judgment was a divisible judgment, made so by the de-

cree of the Supreme Court of Tennessee awarding a recovery in favor of the bank and against the County Trustee, to the extent of the tax paid under protest, applicable to so much of the assessed value of the lot and building used as a banking house, and denying a right of recovery of the taxes sued for on so much of that lot not so used and also on the three lots bought to satisfy debts.

When the case came to be reviewed by this Court, the question was not separable so far as the banking house was concerned. It was either exempt or it was not exempt. If the scope of the exemption was limited to the subject upon which was laid the charter tax, viz., the shares of stock it logically followed that the banking house and no part of it, was exempt. If it was broader in its scope, then it logically followed that if it included the banking house, it was because of the exemption of the capital stock. This Court undoubtedly so considered, for Mr. Justice Field, after citing the Railroad Companies vs. Gaines, 97 L. S., 697, proceeded as follows: "But where the purposes for which a corporation may hold property is specified in connection with the exemption, the limitation of taxation designated must be held to apply only to property acquired for such purposes."

Bank vs. Tenn., 104 U. S., 493-495-496.

When the Judges of the Supreme Court of Tennessee considered the two decisions, taking what was decided in the Farrington case and in the Bank of Commerce case, it undoubtedly appeared to them that in the Farrington case it was held that the immunity from taxation extends to the shares of stock in the hands of the shareholders, and in the Bank of Commerce case, that it extends to so much of the building, the use whereof is required by the actual wants of the bank in carrying on its business. This was the apparent state of the decisions, when the Supreme Court of Tennessee had under consideration the case of Meriwether vs. Union and Planters' Bank, reported as the State vs. Butler, 13 Lea, 406.

Bearing in mind that when there had been three judgments of the Supreme Court of Tennessee, affirming that the immunity from taxation extends to shares of stock in the hands of the shareholders, the franchise and capital stock of these particular corporations, the scope of the exemption of the appellant came again to be considered, and was construed by the

Supreme Court of Tennessee, in 1884, at its April term. Mr. Justice Cook, delivering the opinion of that Court, said, on page 406: "While we are aware of the rule that where there is any doubt as to the power to assess a tax, the doubt must be resolved in favor of the power, yet considering the rule to its fullest extent, standing as this case does, we cannot see where there has been any room left for a possible doubt by the direct decisions upon the very questions involved, that the banking house necessary for and actually used in the conduct of the company, is covered by the exemption."

See DeSoto Bank vs. Memphis, 6 Baxter, 413.
Bank of Commerce vs, McGowan, 6 Lea, 703.
State vs. Butler, 13 Lea, 400-406.

This last decision was followed by the Bank of Commerce case, which is reported in 2 Pickle, 614, where it was again held that the charter of the bank providing it shall pay annually one-half of 1 per cent. on each share of its capital stock, which shall be in lieu of all other taxes, exempts from taxation all realty owned and used by the bank exclusively for banking purposes. See page 633.

It will be observed that an unbroken line of decisions, beginning with the case reported in 6 Baxter, 415, of the DeSoto Bank vs. Memphis, decided at the April term, 1873, and ending with the Bank of Commerce case, reported under the name of State vs. Butler, decided at the April term, 1888, held, that the capital stock of the appellant and other like corporations, was exempt from taxation under the clause in its charter, wherever and whenever it was used, to purchase and hold a lot of ground for its use as a place of business.

These authorities, covering a period of nineteen years, conclusively fixed and settled by judicial construction, the meaning of the charter of the appellant bank, and that construction is as much a part of the charter as the text itself.

The charter of the appellant is contained in a statute of Tennessee. It was not only settled by judicial construction, but that construction has been for years and years acquiesced in, and contract rights were acquired under that construction, for the stock of the corporation continuously changed hands upon the faith of it, and these contract rights are protected.

German Bank vs. Franklin County, 128 U. S., 526-539.
Anderson vs. Santa Anna, 116 U. S., 356.

Taking the last case decided, by which the appellant was adjudged to be a banking corporation under a special statutory charter, with an immunity from taxation upon payment of the special prescribed charter tax on its capital stock, its franchise, its banking house and its shareholders upon their shares of stock, which was at the April term, 1892, we have the statute conferring the charter settled by repeated judicial construction, and in addition an unbroken line of decisions in in Tennessee, beginning with the case of Union Bank in 9 Yerger, decided in 1836, and including the cases reported in 7 Pickle, in accord. Under the Tennessee decisions prior to the decision overruling all these cases, the principle was firmly established that when a decision had been acquiesced in for many years, it established a rule of property, and would not be disturbed.

In Talcott vs. McGavock's Lessee, 1 Yer., 277, the late Mr. Justice Catron, after quoting from the case of Matthews' Lessee vs. Simpson, 1 Tenn., 477, said: "I understand the bench, the bar, the Legislature and the community at large have acquiesced in this decision as the law for twenty years, not with dissatisfaction, but with a settled conviction that it is according to the true sense and meaning of the act of 1797, and I believe, with all possible deference to the opinion of others, it should not now be disturbed, independent of any doubts that might be entertained of its correctness."

In 1840, Judge Reese delivering the opinion of the Supreme Court of Tennessee in Smith vs. McCall's Heirs, 2 Hum., 166, referring to the above case of Talcott vs. McGavock's Lessee, said: "If we doubted, as we do not, the correctness of the judgment in that case, we should still yield to its authority. A greater evil can scarcely be imagined than an habitual fluctuation in judiciad opinions as to questions affecting the rights and regularity of the conduct of a whole community in relation to real property."

The principle for which we contend was applied in the case of the State upon the relation of Gaines vs. Whitworth, 8 Lea., 494-594 on page 611. That case, it occurs to us, is not to be differentiated from the case at bar, on the question. There it appeared that the Legislature of North Carolina by an Act of 1785, created a corporation called Davidson Academy, and by the sixth section, provided "that no lands, tenements or hered-

itaments which may be vested in the trustees for the sole use and behoof of the academy, shall be subject to any tax for the space of 99 years." Part of the land that had been vested in such trustees, was sold to Hicks Ewing & Co., who erected thereon a rolling mill. The State of Tennessee brought suit against that firm to recover the State tax claimed to be due on the land. In 1836 it was held by the Supreme Court, Judge Turley delivering the opinion, that the above exemption attached to the land and followed it into the hands of the purchasers from the trustees of the academy. This decision was acquiesced in until the Comptroller of Tennessee in 1881 filed a petition for a mandamus in the Circuit Court of Davidson County, to compel its trustee to assess and collect taxes upon the certain lots and improvements located in the city of Nashvillle, and known as the "free territory," that name being given to the academy or university lands. The trial court awarded a peremptory writ; the Supreme Cuort of Tennessee reversed that decision. The majority opinion was delivered by Thomas M. Jones, Special Judge, concurred in by Chief Justice Deadrick and John V. Wright, Special Judge.

The principal contentions in the case were, first, that the judgment in the suit of Tennessee against Hicks Ewing & Co., conclusively determined that the exemption exists as that court decided, and, second, that the decision if not res adjudicata, was binding, establishing as it did, a rule of property.

Upon the first proposition, the Court said that "When a "matter is once adjudicated, it is conclusively determined as "between the same parties and their privies, and this deter- "mination is binding as an estoppel in all actions, whether "commenced before or after the action in which the judgment "was made. Citing Freeman on Judgments. Sec., 249.

"It is undoubtedly true that the decision of the case in 9 "Yerger, is binding and conclusive upon the State in all suits "brought by the State against the same parties and their "privies, involving the same questions, and it is equally true "that the same questions raised and involved in the decision "of the suit of the State vs. Hicks Ewing, are involved in this "suit, but as the defendant or defendants in this suit, treat- "ing the Trustee as a mere formal party, and the owners of "the lot mentioned in the exhibit, as the real defendants, are "not in privity with Hicks Ewing & Co., or were parties to

"that suit, and each succeeding Court can overrule its own "decision, it follows that they cannot be relied upon, and plead "the decision in that suit in bar of this suit. Citing

5. Sneed, 105.

12. Frisk., 34.

Cooley on Constitutional Limitations, 48-49, Note I and authorities cited. See pages 610-611."

It is noticeable that the Court concedes the conclusiveness of a former judgment against the State in a tax suit where the subsequent suit is against the parties in which the judgment was pronounced, or their privies, and where the same questions were involved.

There was no variation in the decisions of the Supreme Court of Tennessee until the dictum of Judge Gillham in the case of the City of Memphis vs. Bank of Commerce, hereafter to be referred to.

But in the case of the State upon the relation of Gaines vs. Whitworth, a great question was involved. By the Act of the Legislature of the State of North Carolina, passed in 1785, an exemption from taxation for a period of 99 years was annexed to 240 acres of land then contiguous to the village of Nashville, and which subsequently became a part of the city limits. The Court, in 1836, having decided that that exemption attached to the land itself, in whosoever hands it passed, during the full period of 99 years, and the question in the Supreme Court of Tennessee in 1881, was whether that decision would be followed. The Judge delivering the opinion, thus stated the question and decided it:

"But this brings us to the consideration of the last and decisive question in the case—and that is, how far we are bound to respect that decision, or regard it as binding upon us, although we may not concur in its correctness. The case was decided in 1836. It was argued by George S. Yerger, attorney general and reporter for the State, and by Hons. W. A. Cook, E. H. Ewing and F. B. Fogg for the defendants—lawyers who at that time stood at the head of the bar in Tennessee, and it is no disparagement to the profession to say, that since that time they have had no superiors and but few equals. It was decided by a court which for many years adorned the Supreme Bench of Tennessee, and commanded the entire confidence of the profession, and of the citizens of the State. It was

an agreed case, and doubtless made up that the important questions involved in it might be finally settled. We cannot suppose that it was not ably argued, and fully and carefully investigated. The State, the county, and the city have acquisced in it for over forty years. Upon its correctness capital has sought investment in that 'territory,' and built valuable improvements thereon. The petition makes a solemn admission that since 1836, 'this decision has been treated by the professinn as settling the question that this property was exempt from taxes for the State, county and city.' It has to all intents and purposes become a rule of property, so far as a decision of the highest court in the State can make and establish that rule."

In the case of the Davidson Academy, the exemption was of the lands, tenements or hereditaments which may be vested in the Trustees of the County of Davidson, for the sole use and behoof of the academy, and for the space of 99 years. In case of the Union and Planters' Bank, the charter tax is imposed annually to be paid to the State, on each share of capital stock subscribed, expressed to be in lieu of all other taxes, and by a judicial construction of the one charter, for a space of 99 years lands that were vested in trustees for the use and behoof of the academy, remained exempt from taxes in whosoever hands those lands passed, and by a like construction, the capital stock, the franchise, and the banking house, and the shares of stock in the hands of the shareholders of the appellant bank, have been judicially construed to be within the exemption, and covered by it.

It is to be noted that the Act of North Carolina, 1785, incorporated an academy, and that the rights of every character and description that were vested in the trustees of that academy, were by an Act of the Tennessee Legislature, vested in the Trustees of Cumberland College. It is difficult to draw the line of demarcation between cases that establish a rule of property, and cases that are held not to establish a rule of property. Lands pass by deed, by devise, and descent. Membership in a banking corporation is evidenced by what are called certificates of stock, and they pass by sale and delivery, and by bequest and descent, and by gift. The right of a member of a banking corporation is to receive dividends, and to

share in the distribution of the assets upon its winding up, and the right of the corporation is to conduct its business under its charter, and to acquire and hold property thereunder, the most valuable of which is its franchise to do business.

In Leffingwell vs. Warren, 2 Black, 299, this Court said: "The construction given to a statute of a State, by the highest judicial tribunal in such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text." Citing:

Shelby vs. Guy, II Wheat, 351.
McCluny vs. Silliman, 3 Pet., 270.
Greene vs. Neil's Lessee, 6 Pet., 291.
Ross vs. Duval, 13 Pet., 45.
Massingall vs. Downs, I How., 767.
Nesmith vs. Sheldon, I, How., 812.
Van Rensselaer vs. Kearney, II How., 297.
Webster vs. Cooper, 14 How., 504.

Applying the principle underlying the decisions, we respectfully submit to the Court that the exemption in this case is broader than the subject upon which the charter tax is laid, because the charter tax is undoubtedly laid on each share of stock subscribed and not on each share of capital stock, and as an independent and original proposition, the construction which we contend for is plain and obvious, but when it is reinforced by a long line of decisions, acquiesced in for years and years, constituting a statutory construction based, many of them, upon the judicial utterances of this Court, the property rights that have been acquired under those constructions ought not to be disturbed, and the case of Shelby County vs. the Union and Planters' Bank, 161 U. S., ought to be differentiated to the extent of holding that the capital stock of the appellant is exempt from taxation. In the Nashville case the Court assumed that the agreed case was made that the questions might be decided; the cases reported in 7 Pickle were brought to put at rest all questions under the charters.

2. It is next assigned for error that the Circuit Court of Appeals limited the plea of res adjudicata in this suit, and thereby denied to the appellant its exemption from taxation upon its capital stock, the subject matter that was involved in the previous litigation, on the identical state of facts, and in doing so impaired the obligation of a contract between it and the State of Tennessee, and its local instrumentalities of

government, as that contract had been judiciously construed and determined in the prior suit.

It is a pleasure to discuss, or to even read an opinion handed down by Circuit Judge Lurton, because he deals with a question with great ability and fairness. If he is right in his application of the principle which he deemed controlling of this question, then it is conceded that his reasoning is sound. The learned Judge, in the course of his opinion, thus stated the question, giving in his statement the contentions before the Circuit Court of Appeals:

"But the duty of interpreting the scope and meaning of the exemption clause may be regarded as eliminated if it be true, as claimed, that the exemption exists as claimed because it has been so determined by the judgment relied upon as res adjudicata.

"On this point, in New Orleans vs. Citizens' Bank, 167 U. S., 371-387, Mr. Justice White, speaking for the Court, in a case where a charter exemption was claimed from general taxation by force of certain former judgments, said:

> "'Of course, if the judgments are the things adjudged and conclusively determined as between parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question.'

"Passing then the interpretation of the scope of the charter exemption as an original question, and as effected by the decisions heretofore made considered as mere authorities, we come to the examination of the effect of the judgment of the Supreme Court of Tennessee pronounced in a suit wherein the present complainant and appellant, the Union and Planters' Bank, and the city of Memphis, the present defendant and appellee, were adversary parties; and in which it was adjudged and determined, that the charter tax of one-half of one per cent. was in lieu of all other taxes against the capital stock of said bank as well as against the stockholders upon their shares of stock, and that the capital stock of said bank was not liable to the assessment which had been made, nor for the license or privilege tax asserted against it.

"That the suit in which said judgment was rendered was in

the name of the State for the use of the city of Memphis, is of no moment.

"The city was the real party and is as much concluded as if the suit had been prosecuted directly by it. New Orleans vs. Citizens' Bank, 161 U. S., 371-388; Scotland County vs. Hill, 112 U. S., 183.

"We come then to the question of the efficacy of the judgment in the prior case as adjudging conclusively that an exemption exists which extends to the capital stock of the complainant bank. The city taxes involved in the prior case were those assessed upon complainant's capital stock by the city of Memphis for the years 1888 to 1891, inclusive."

The taxes involved in the present case are taxes asssessed by the same municipality and upon the same capital stock for the year 1899.

The cause of action in the two cases is, therefore, not the same, inasmuch as the demand in the adjudged case was taxes of certain years other than the years involved in this suit.

But the question of exemption of the capital stock from taxation other than that stipulated in the charter was necessarily presented and determined adversely to the claim of the city of Memphis, upon identically the same facts upon which the right of exemption is now claimed.

Under the decisions of the Supreme Court of the United States, the mere fact that the present demand is for a tax for one year, and the demand in the adjudged case was for taxes for other and antecedent years, "does not prevent the operation of the thing adjudged." New Orleans vs. Citizens' Bank, 167 U. S., 371, 396, 398; Southern Pacific R. R. vs. U. S., 168 U. S., 1, 52; New Orleans vs. Citizens' Bank.

In New Orleans vs. Citizens' Bank, the Court said:

> "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has, under identical circumstances and conditions, been previously concluded by a judgment between the parties or their privies."

"This," said the Court, "is the elemental rule, stated in the text books and enforced by the many decisions of this court."

Among the cases cited as supporting this principle are the cases of Bank vs. Beverly, 1 How., 134, 139; Cromwell vs. Sac. County, 94 U. S., 351, 353; and Last Chance Mining Company vs. Tyler Mining Company, 157 U. S., 683, and the case of Heroman et al. vs. Louisiana, 34, La. An. 805, 814.

This well settled rule was applied in a case in which the controversy was as to the efficacy of prior judgments upon demands for taxes for years other than those involved in that case, which judgments had been rendered in local courts of the State of Louisiana. In that case it was also contended that public policy forbade the application of the principle stated to controversies as to taxation. After saying that this argument, if meritorious, should be addressed to the law making and not to the judicial department, Mr. Justice White said, that "it was without real merit." "In its ultimate aspect it asserts that no question concerning government or public authority ought ever to be submitted to judicial investigation. Indeed, the contention is that there is no power in courts of justice to consider any question of taxation or render any judgment in relation thereto. That this is the result of the proposition is manifest from the fact that the very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances and conditions between parties or their privies. To admit the judicial power on the one hand, and to deny on the other the very substance and essence of such power, is not only contradictory, but destructive of the fundamental conceptions upon which our system of government is based. Under this theory the cause under consideration should not be entertained, but should be dismissed. Accepting the argument in its full consequence, every judgment rendered by this court from the foundation of the government, declaring a particular tax or burden unconstitutional, imparts no efficacy whatever. Every decree of this court enforcing taxation in order to discharge obligations previously contracted, where the right to the tax was a part of the obligation, is deprived of the sanctity of the thing adjudged, for manifestly if the estoppel of the thing adjudged does not arise from a judgment preventing taxation, such an estoppel cannot also result from a judgment enforcing taxation."

But the defendants say, that whatever the efficacy of such a judgment ordinarily the judgment plead in bar and as a conclusive adjudication of the question of exemption here involved, is a judgment of the Supreme Court of Tennessee, and that under the well settled rule of that court a judgment in a tax case is not conclusive between the parties except as to the particular taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years when relied upon as res adjudicata. State vs. Bank of Commerce, 95 Tenn., 231; Bank vs. Memphis, 101 Tenn., 154, 167.

The opinion of the court in that case was by Judge McAllister, who, upon this subject, said:

> "We think the plea of res adjudicata in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a Federal question, we decline to follow the ruling in New Orleans vs. Citizens' Bank, 167 U. S., 371, in which it was held by a majority opinion that a judgment in a tax case is as conclusive of the taxes of other years as is of the taxes for the years actually involved.
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> "In State vs. Bank of Commerce, 95 Tenn., 231, we said: 'These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case,' citing Cromwell vs. County of Sac., 94 U. S., 351; Nesbett vs. Riverside Ind. Dist., 144 U. S., 610; W. & W. R. R. vs Alsobrook, 146 U. S., 279; Keokuk R. R. vs. Missouri, 152, U.. S, 301. We adhere to that ruling."

The effect of the judgment in Bank vs. Memphis as res adjudicata in avoiding the efficacy of the prior judgment now relied upon as res adjudicata, is not now before us, inasmuch as that judgment has not been plead or proven, the present hearing being upon a demurrer to the bill of complainant which does not set out the judgment in the case referred to. Turley vs. Turley, 85 Tenn., 252, 261; Jourolmon vs. Massengill, 86 Tenn., 81; Daniels Eq. Pl., 659, 661; United States vs. Bliss, 172 U. S., 321; Bryan vs. Campbell, 177 U. S., 469; Freeman on Judgments, Sections 283, 332.

The case comes to this: The complainant pleads a judgment as conclusively establishing that a charter exemption exists giving it immunity from the tax here involved, which

judgment has no force or effect in the court which rendered it other than as a bar to another suit for the same identical taxes then in litigation, and which, under the law and usage of that State "is not conclusive in respect of taxes assessed for other and subsequent years."

After the statement thus made, the opinion of Circuit Judge Lurton reviews the authorities deemed in point, and thereupon declined to give any effect whatever to the judgment of the Supreme Court of the State of Tennessee, pleaded as an estoppel, in so far as that judgment judicially and conclusively determined the scope of the exemption in the charter of the appellant, to the extent of an immunity from taxes on its capital stock.

The first inquiry is, did the Circuit Court of Appeals give to this judgment, pleaded as an estoppel, such faith and credit as the Revised Statutes of the United States requires to be given to judgments, viz., "as they have by law or usage in the courts of the State from whence the said records are, or shall be taken?"

In the Bank of Ky. vs. Stone, 88 Fed., 383-397, affirmed by this Court, it was suggested that a subsequent decision of the Kentucky Court of Appeals in the Deposit Bank vs. Davies County, 39 S. W., 1030, had overruled the Bank Tax Cases reported in 97 Ky., 590, and thereby ousted the Circuit Court from jurisdiction, because it made the case turn on the question which did not arise under the laws and Constitution of the United States.

In disposing of the contention, Judge Taft says:

> "We cannot assent to this suggesion. The complainant asserts that it has a contract with the Commonwealth in respect to taxation, the obligation of which the city of Louisville, the city of Frankfort and the county of Franklin, by the enforcement of a subsequent law of the State, are seeking to impair. The defendants deny the existence of such a contract, and we must determine whether, as between the parties, such a contract exists. It appears that, as between the complainant and defendants, it has been conclusively adjudicated that such a contract exists. This relieves the Court from re-examining that question as an original one between the present parties; but it does not free the Court from the obligation to enforce the Constitution of the United States, in favor of the complainant, by enjoining the enforcement of a law which will impair

the obligation of a contract thus conclusively established. The case of the City of New Orleans vs. Citizens' Bank of Louisiana, 167 U. S., 371, 17 Sup. Ct., 527, which presented precisely this aspect, was begun in the Circuit Court of the United States, and was carried to the Supreme Court of the United States, and the jurisdiction by the Circuit Court was not even questioned.

"It is argued that the Federal Courts, in considering the question whether a State law impairs the obligation of a contract, will not accept as conclusive the construction which the Supreme Court of the State has put upon its Constitution or laws in determining the existence of a contract and its violation. This is true, and is settled by a long line of authorities. Shelby Co. vs. Union and Planters' Bank, 161 U. S., 149, 16 Sup. Ct., 558; Mobile & O. R. R. vs. Tennessee, 153 U. S., 492, 493, 14 Sup. Ct., 968; Bryan vs. Board, 151 U. S., 650, 14 Sup. Ct., 465; Railroad Co. vs. Palmes, 109 U. S., 256, 3 Sup. Ct., 193; Douglas vs. Kentucky, 168 U. S., 488, 502, 18 Sup. Ct., 199, and cases cited. But the rule has application only where the judgment of the State Court is under direct review, or in cases in which the opinion of the State Court is cited merely as an authority and a precedent. It has no application to a case in which a prior judgment of the State Court between the same parties, is pleaded or is offered in evidence in a subsequent suit in a Federal Court as res adjudicata binding the parties. The State Court is as much bound by the Constitution of the United States as a Federal Court, and is vested with as complete jurisdiction in causes otherwise within cognizance to decide, between the parties before it whether a statute of the State impairs the obligation of a contract. Robb vs. Connolly, 11 U. S., 624, 637, 4 Sup. Ct., 544. Such decision, embodied in a judgment unreversed, is as binding with respect to the point adjudged as if it had been rendered by the Supreme Court of the United States. The distinction between the right and duty of the Supreme Court to decide for itself the question of contract or no contract without regard to the State decisions and its obligations to respect the bar of res adjudicata as between the parties, is quite clearly made in Douglas vs. Kentucky, 168 U. S., 488, 503, 18 Sup. Ct., 199, although not expressly commented on. In that case, after maintaining in the strongest terms, the obligation of the Supreme Court to exercise an independent judgment in determining the existence of a contract and its impairment, and after declining to follow a prior decision of the State Court upon the subject, the Court considered as a distinct matter, the question whether the point had not

been formerly adjudged in a State Court between the same parties, and pointed out with much care that the point of the former adjudication was not the same as that then before the Court. The whole discussion would have been wholly unnecessary if, as contended by counsel for defendants, the doctrine of res adjudicata has no application in the Federal Courts when the former adjudication is that of a State Court upon a question arising under the Federal Constitution."

After this Court, speaking by Mr. Justice White in New Orleans vs. Citizens' Bank, 167 U. S., 371, had reviewed the authorities in this court on the law in respect of estoppel by a judgment, the opinion is as follows: "And the law of Louisiana is exactly in accord with the rulings of this court, for, as said by the Supreme Court of Louisiana, in Heroman vs. Louisiana Institute of Deaf and Dumb et al., 34 La| Ann., 805-814:

"No principle of the law is more inflexible than that which fixes the absolute conclusiveness of such a judgment upon the parties and their privies. Whether the reasons upon which it was based were sound or not, and even if no reasons at all were given, the judgment imports absolute verity, and the parties are forever estopped from disputing its correctness. Cooley on Const. Lim., p. 47 et seq., and authorities there cited.

"Matters once determined in a court of competent jurisdiction may never again be called in question by parties or privies against objection, though the judgment may have been erroneous and liable to, and certain of reversal in a higher court. Bigelow Estoppel, 3d ed., Outline, pp. lxi., 29, 57, 103.

" 'The estoppel extends to every material allegation or statement which, having been made on one side and denied on the other, was at issue in the cause, and was determined therein.' Aurora vs. West., 7 Wall., 102; 4 N. Y., 113; 2 An., 462; 14 An., 576; 19 La., 318; 5 N. S., 664; 11 M., 607; 14 La., 233; 5 N. S., 170."

It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

Our contention is that the question of exemption in the prior

suit was the issue made, and determined upon identically the same facts upon which the right of exemption is here claimed, and that therefore, that ordinary case of a suit for taxes for one year, is without application, for while the suit for taxes of a subsequent year is upon a distinct demand, yet when the question which was determined was the scope of an exemption, and that exemption held to include the identical tax involved in the previous suit, to deny the benefit of the judgment conclusively determined between the parties, that the exemption of the bank under its charter exists to the extent that the judgment itself determined, is to deny the force of the judgment altogether, and that is not the law of Tennessee. For it may be stated that the law of that State is that when a judgment or decree of a court of competent jurisdiction is once pronounced, upon a question directly involved in an action, it is conclusive between the parties and their privies, of all matters in controversy, of which the judgment or decree was the legal result, and the same can never again be drawn in question between the same parties or their privies, except by some proceeding in the way of an appeal, or bill of review.

Estell vs. Taul, 2 Yer., 467.
Green vs. Farris, 7 Yer., 161.
King vs. Vaughan, 8 Yer., 59.
Hodges vs. Buchanan, Id., 185.
Elrod vs. Lancaster, 2 Head, 574.
Warwig vs. Underwood, 3 Head., 238.
Brewster vs. Galloway, 4 Lea., 567.
McClanahan vs. Stovall, 6 Lea, 505.
Roper vs. Rowlett, 7 Lea, 321.
Parker vs. Cliff., 9 Lea, 524.

As far back as 1830 it was conclusively determined in Tennessee that a fact that had once been directly decided, shall not be again disputed between the same parties or their privies, and that therefore a judgment of the same court, or one of concurrent jurisdiction. whether upon verdict, demurrer or by default, if directly upon the same point, may be pleaded in bar as an estoppel.

Estell vs. Taul, supra, 469-470.

And again, the law of Tennessee has been that a decree of the Supreme Court of another State, construing a contract between two parties, is conclusive in a suit in Tennessee for the

same property, between the same parties, or those claiming through them.

Pigg vs. Ligon's Admr., 10 Yer., 469-471.

In the case, Judge Reese, speaking for the Court, said: "The task is not ours to fix a construction upon the ante-nuptial contract and determine the rights of the parties with regard to it. That has been done. It is res adjudicata, and the parties before the Court are concluded by it."

The construction given to a contract, where the point in controversy was its proper interpretation, brought for the purpose of having it determined, becomes, as to its construction, the very thing adjudged, and the parties to that suit are concluded thereafter forever by that construction, unless, because the construction itself effected a tax, the principle of estoppel had no application.

We cannot add to Mr. Justice White's argument on this point in New Orleans vs. Citizens Bank, supra, 398-399, and thereore we pass to the consideration of the two cases that are assumed to have established the law of Tennessee as to the efficacy of judgments pleaded as estoppels where taxes were involved.

According to the Supreme Court of Tennessee the respect to which it is entitled by reason of the eminence of the Judges, and their great learning, we respectfully submit to this court that where the dictum occurred in the case of the State vs. the Bank of Commerce, that first affirmed the proposition in these words: "These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case." Citing—

Cromwell vs. County of Sac., 94 U. S., 351.
Nesbitt vs. Riverside, etc., 144 U. S., 610.
The W. & W. R. R. Co. vs. Alsobrook, 146 U. S., 279.
Keokuk R. R. vs. Mo., 152 U. S., 301.

there was no plea of res judicata or judgment offered as evidence. The case was tried upon a demurrer to the bill of complaint filed by the State for the use of the city of Memphis, and the suit was in the alternative, to collect either ad valorem taxes upon the capital stock or upon the shares of stock. Mr. Farrington was not a shareholder in the Bank of Commerce. There was no party in privity with him, before the court in

the Union & Planters' Bank case. In the Bank of Commerce case it was held that the shares of stock were subject to taxation, and that the capital stock was exempt. A mere casual examination of the case reported in 11 Pickle, 221, will show that the statement of the law of Tennessee was a mere dictum, had no place in the decision, and ought not to have been there.

The next case involved three questions: First, whether the capital stock of the appellant was subject to ad valorem municipal taxes? That case is reported in 101 Tenn., 154-167.

It is quite noticeable that the court decided that the capital stock of the appellant bank was not liable to municipal taxes, because there was no law to tax it. The court proceeded to construe the decision of this court in the case reported in 161 U. S., and gave to the exemption that construction which was put upon it by Mr. Justice Peckham, although directly adjudging the non-liability of the bank to pay ad valorem taxes upon its capital stock disposed of the plea of res adjudicata, in these words: "We think the plea of res adjudicata in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect to taxes assessed for other and subsequent years."

In the consideration of the case of New Orleans vs. Citizens' Bank, supra, on page 400, Mr. Justice White reviewed the two Iowa cases, and on page 401 said: "It follows then, that the theory by which it is sought to take questions of taxation entirely out of the rule of the thing adjudged is not only without foundation in reason, but is also without support of authority, since the case from this court which is cited to sustain it, cannot, properly, be said to sustain the contention, and the other from the Supreme Court of Iowa, has been either overruled or qualified."

Undoubtedly the ordinary suit for taxes is a plain action, but if the right to recover, or the defense thereto is based upon a particular ground, and thus the right of the matter is determined by a court of competent jurisdiction, then as that matter was adjudicated in the prior suit, in a subsequent suit for taxes on the same subject matter, for a subsequent year, the judgment in the prior suit is an estoppel, when so pleaded, and the law of Tennessee is not different from the general law.

Here the case is the judicial construction of a contract be-

tween the State of Tennessee and the appellant in a suit brought by the State of Tennessee to recover ad valorem taxes on the capital stock of the appellant, upon identically the same law, and where the identical defense now relied on was then relied on, and affirmed to be well made. Unless the doctrine of the estoppel of a judgment has no application to tax litigations, then the general rule in Tennessee is that the construction given to a contract in the prior suit, precludes a further consideration of that contract, and must prevail.

In Westbrook vs. Thompson, 104, Tenn., 363, on page 375, the Court, speaking by Judge Wilkes, said: "The complainant is precluded by the result of the original suit, from setting up any claim under his bill. That in the absence of a perfect transcript of such former case, the Court must presume that all the facts appeared to make the sale of the land valid and binding, and that the pleadings and proof were sufficient for that purpose, and the complainant is now estopped to claim anything on account of the annuity, or the sale of the land, either by subrogation or by way of personal judgment."

In Sale vs. Eichberg, 105 Tenn., 333, the Supreme Court of Tennessee stated the general rule as follows: "The estoppel of a judgment or decree extends to all matters material to the decision of the cause which the parties, exercising reasonable diligence, might have brought forward at the time. The question then is, Was the question of whether these legacies were special or general directly involved in the former suit? We are compelled to say it was. The defendant might have insisted that they were general legacies, and if the Court had so held the land could not have been sold."

From the Tennessee cases, it will be observed from the first to the last that where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, that that matter is forever concluded between the parties and their privies, where the judgment is final.

It is undoubtedly true that by Section 1 of Article IV. of the Constitution of the United States, it is provided that full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of any other State, and that under this power the Congress did at an early day enact that the said records and judicial proceedings, authenticated as afore-

said, "shall have such faith and credit given to them as they have by law or usage in the courts of the State from whence the said records are, or shall be, taken," but we submit that it is not the law of Tennessee that the plea of res adjudicata, because in a prior suit the question of taxation was involved, is to be limited so as to exclude its conclusivenes of the very matter in issue and decided in the prior suit, because the estoppel was pleaded in bar of the matter in a suit in respect of taxes assessed for other and subsequent years.

In the State against Bank of Commerce, 95 Tenn., 231, it was said: "These suits being for other years than those sued for in the Farrington case, that decision is not (as an adjudication) conclusive of the present case," and the authorities cited in support of that proposition not one of them sustained it, but it was a dictum, pure and simple.

Turley vs. Turley, 85 Tenn., 252-261.
U. S. vs. Bliss, 172 U. S., 321.
Byar vs. Campbell, 177 U. S., 649.

So the law or usage must rest alone for support upon what the Court said in the Bank vs Memphis, Supra, on page 167.

It is obvious from an examination of the case, that what was said by Judge McAlister was inadvertently said. He decided that the capital stock of the bank was not liable to taxation, because the Legislature made no provision for its assessment. See page 168. But he held that the bank was liable for privilege taxes to the city of Memphis and against the collection of such a tax there was pleaded a prior judgment.

On page 167 of the case, after reviewing the decision of this Court in the Union and Planters' Bank vs. County, in 161 U. S., Judge McAlister said: "The Court, after a review and discussion of the cases, held, viz., 'This determines the liability of the capital stock of the Union and Planters' Bank to taxation, and of course it overrules any claim on the part of that bank for exemption from taxation of its surplus or accumulated profits.'

"If, therefore, the principle of judgment estoppel is to be invoked, the last judgment of the highest appellate tribunal determines the taxability of said capital stock."

There was no question in the case of Shelby County against the Union and Planters' Bank, determined or to be determined, except whether the charter exempted from taxation the sur-

plus or accumulated profits of the bank, and therefore the only question determined was, that it did not. It is settled that where the only question presented and decided in the record, was the non-liability of a bank for taxation on its surplus that the judgment does not and cannot include other objects not embraced in the contention.

New Orleans vs. Citizens' Bank, supra, 401.

The opinion of the Supreme Court was based upon the first ground stated by Mr. Justice Peckham, and that in his belief at least the true interpretation of the charter exemption extended only to shares of stock in the hands of the shareholders. But it likewise appears by the opinion in the Farrington case, supra, that Mr. Justice Swayne was of the belief that the exemption was broad enough to, and did cover, other objects of taxation, for he said: "It may as well be said, the power is reserved to tax anything else as further tax the shares. We cannot so hold without interpolating into the clause a term which it does not contain. This we may not do. Our duty is to enforce the contract as we find it, and not make a new one.

95 U. S., 688-689.

In the case of the Southern Pacific R. R. vs. U. S., 168 U. S., 5, on pages 48 and 49, this Court, speaking by Mr. Justice Harlan, said:

"The general principle announced in numerous cases is that a right, question or fact, distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and even if the second suit is for a different cause of action, the right, question, or fact, once so determined, must as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

The last of the cases which Mr. Justice Harlan considered in his opinion was New Orleans vs. Citizens' Bank, supra, as to which, among other things, he said: "In New Orleans vs. Citizens' Bank it was held that the final and unreversed judgment of a court of Louisiana, of superior jurisdiction, upon the issue duly raised by the pleadings, whether the bank was exempt by contract with the State from taxes assessed against it for particular years, concluded that questions, as between the same parties and their representatives, in respect of taxes assessed against it for subsequent years. In that case the Court said: "The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies.'

These decisions were followed by this Court in the Kentucky tax cases, affirming the decrees of the Circuit Court at Louisville, shortly reported in 174 U. S.

In Forsythe vs. Hammond, 166 U. S., 506, Mr. Justice Brewer said: "The principles controlling the doctrine of res judicata have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions." 517-518.

The Supreme Court of Tennessee undoubtedly fell into error by taking what Mr. Justice Peckham said as to the construction of the exemption clause in appellant's charter, as the thing adjudged. That which was adjudged was that the exemption clause did not extend so as to give an immunity from taxation to the surplus and undivided profits of the appellant. That is a distinct object of taxation from capital stock.

Farrington vs. Tennessee, Supra.

Giving to the statement of the Supreme Court of Tennessee its full force, and conceding that in the case cited, that the plea of res judicata was denied, then undoubtedly in the case that court gave no efficacy whatever to the previous judgment, although by that previous judgment, which was unre-

versed, there was a conclusive adjudication between the parties under identical circumstances and conditions of the very matter in issue, and thereby settled this question.

We submit the question is not what Judge McAlister said in the case reported in 101 Tennessee, but is what effect does a judgment of a Court of Tennessee have by the law or usage, in the courts of that State, when pleaded as an estoppel generally. IF THE COURT HAD JURISDICTION, IF THE JUDGMENT WAS FINAL AND UNREVERSED, AND A RIGHT, QUESTION OR FACT DIRECTLY PUT IN ISSUE AND DIRECTLY DETERMINED BY A COURT OF COMPETENT JURISDICTION IN TENNESSEE, AS A GROUND OF RECOVERY, WE SUBMIT THAT BY THE LAW AND USAGE IN TENNESSEE, THE JUDGMENT DETERMINING THE RIGHT, QUESTION OR FACT, WHEN PLEADED AS AN ESTOPPEL, OR RELIED ON AS EVIDENCE, IS, AS BETWEEN THE PARTIES OR THEIR PRIVIES, IN A SUBSEQUENT SUIT, CONCLUSIVE. If we take the cases of taxation out of the realms of estoppel, and affirm that no question where taxation is involved can be judicially determined except that of the particular demand in suit, then we engraft upon the doctrine of estoppel a doctrine wholly at variance with the principle established from the Duchess of Kingston's case which has universally obtained. In principle there is no difference between a plea of estoppel in favor or against a sovereign, or by and against individuals. The State of Tennessee is entitled to the benefit of estoppel and so are individuals sued by the State of Tennessee.

People vs. Stephens, 71 N. Y., 527-541.
People vs. Stephen & Gale, 52 N. Y., 306.

It is observable that the principles of estoppel by judgment are not subject to exception in favor of the sovereign, but they universally obtain, and universally obtaining as they do, the law and usage in Tennessee is in accordance with the latest utterances of the Supreme Court of that State, in the two cases cited, the one from 104 Tenn. and the other from 105 Tenn., supra.

In this view of the case the Circuit Court of Appeals committed a manifest error in its application of the provision quoted in Judge Lurton's opinion of the Revised Statutes of the United States passed pursuant to Section I of Article

4 of the Constitution of the United States, in that it did not give to the judgment and decree of the Supreme Court of Tennessee that faith and credit it was entitled to have by the law of the courts of the State.

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